United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2005

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-2005

B

ESTATE OF SUMNER GERARD, COSTER GERARD, SUMNER GERARD, JR., JAMES W. GERARD, II and CHEMICAL BANK, EXECUTORS,

Appellants,

P/S

- against -

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

ON APPEAL FROM THE UNITED STATES TAX COURT

BRIEF ON BEHALF OF APPELLANTS

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Docket No. 74-2005

Appellants' Brief

Preliminary Statement

The findings of fact and opinion of the Tax Court are officially reported and appear at 57 T.C. 749. The decision pursuant to a Rule 50 computation under the Tax Court Rules was rendered by the Trial Judge, Hon. William H. Quealy.

The case involves a deficiency in federal estate tax determined against the taxpayer, Estate of Sumner Gerard, et al., (hereinafter "Petitioners") in the amount of $4,111,906.38, of which approximately $482,000 is presently in dispute. That portion of the deficiency, which is at issue in this appeal, is the result of a determination that the decedent, Sumner Gerard, gave certain property as a gift in contemplation of death pursuant

to section 2035[1] which requires the inclusion in a decedent's gross estate of all property transferred in contemplation of death (other than property transferred in a bona fide sale for adequate and full consideration). It is generally accepted that the language of Section 2035(b) creates a rebuttable presumption that all gifts made by a decedent within 3 years of his death are in contemplation of death. The instant gift was made approximately two years and two months prior to decedent's death.

The Tax Court held that because of the decedent's age, condition of health, and the testamentary nature of the gifts in question such gifts were made in contemplation of death pursuant to Section 2035.

QUESTION PRESENTED

1. Whether the gift by decedent herein on January 2, 1964 of 17 shares of stock of Aeon Realty Company to each of his three sons was a gift in contemplation of death within the meaning of Section 2035.

STATEMENT OF FACTS

Sumner Gerard ("Decedent") was born on August 25, 1874 and died at the age of 91 a resident of New York, New York on March 10, 1966 (the "date of death"). (App 27a).*

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[1]All citations in this brief are to the Internal Revenue Code of 1954, as amended (the "Code"), unless otherwise indicated.

*References in the form "App . . . a" refer to the Appendix filed with the U.S. Court of Appeals for the Second Circuit.

Petitioners, the executors of Decedent's estate, are his sons, C. H. Coster Gerard, Sumner Gerard, Jr., and James W. Gerard, II (App 28a) and Chemical Bank New York Trust Co. ("Chemical Bank").

Decedent's son, Sumner Gerard, Jr. became involved over the years in a precarious financial situation, which eventually persuaded Decedent to furnish assistance by transfering 17 shares of Aeon Realty to Sumner Gerard, Jr. on January 2, 1964.

After service in World War II, Sumner Gerard, Jr. decided to settle in the West. (App 89a). After a search in 1947, he found a ranch in Ennis, Montana which was owned by The Ennis Company, a Montana Corporation. Decedent purchased The Ennis Company in 1948, on the recommendation of his son. (App 90a).

In 1954, The Ennis Company was liquidated and a partnership was formed. On December 31, 1958, The Ennis Company (hereinafter "Ennis") was reincorporated and the assets of the partnership were transferred to the corporation. Ennis, after reincorporation elected to comply with the requirements of Subchapter "S" of the Code, and it continued to so qualify until the date of death. (App 30a, 91a). Because of Ennis' substantial operating losses, both Decedent and Sumner Gerard, Jr. were able to claim substantial operating loss deductions on their individual federal income tax returns during the years involved. (Ex. 6-8).

Upon the reorganization of Ennis, through the

date of death, Decedent owned 2680 shares of the outstanding capital stock of Ennis. (App 30a). The remaining 1320 shares of outstanding capital stock of Ennis were distributed to and held by Decedent's son, Sumner Gerard, Jr. and his wife in return for services rendered to the predecessors of Ennis. Sumner Gerard, Jr. and his wife did not contribute any capital for their shares in Ennis. (App 92a).

Decedent, during his lifetime, was very interested in Ennis and visited the ranch nearly every summer, including the summers of 1960 and 1961. (App 94a, 198-199a).

During the calendar years 1959-1965, the annual operating statements of Ennis reported net operating losses in the following amounts:

Year	Loss
1959	$72,182.02
1960	14,582.24
1961	40,705.99
1962	46,966.50
1963	121,651.01
1964	57,892.33
1965	52,916.86

(Exs. 111-117, Exhibit B)

During the same period, the federal corporate income tax returns for Ennis reflected losses as follows:

Year	Loss
1959	$72,182.02
1960	4,272.14

1961	28,310.09
1962	32,317.47
1963	121,651.01
1964	57,892.33
1965	52,916.86

The difference in the financial statement losses and federal income tax return losses was due in part to certain income (unrelated to the case) reported on the tax returns on the installment basis and a loss on a well-drilling operation in 1962. (Exs. 111-117).

A substantial portion of Ennis losses was due to high interest rates that Ennis was required to pay on outstanding bank loans. Interest payments by Ennis in the years 1959 through 1965 were as follows:

Year	Interest Expense
1959	$14,251.52
1960	11,608.50
1961	17,120.67
1962	17,304.91
1963	26,833.24
1964	14,836.70
1965	47,844.45

(Exs. 112-117, Exhibit B)

Ennis borrowed funds on a continuing basis from the Metals Bank and Trust Co. of Butte, Montana (hereinafter "Metals Bank"). The year-end loan balances of and the amounts borrowed by Ennis from Metals Bank for the years

1959-1964 were as follows:

Year	Loan Balance	Increase in Amounts Borrowed
1959	$157,749	
1960	147,079	
1961	179,619	$32,539
1962	277,138	97,519
1963	300,796	23,658
1964	366,774	65,978

(App 267a)

The loans by Metals Bank to Ennis were secured by the cattle of Ennis, and by the marketable securities owned by Decedent, Sumner Gerard, Jr. and his wife. (App 261a). The current short-term indebtedness for the cattle raised on the Ennis ranch was usually in excess of such cattle's fair market value and whatever appreciation had taken place in Ennis was in real estate. (App 135a, 267a; Compare "Exhibit A" [Balance Sheet] with Livestock Account Reconciliation "Schedule A-1" of Exs. 111-118; App 261a).

The profit potential of Ennis was a matter of great concern to Decedent as well as to Sumner Gerard, Jr. (App 137a). Decedent believed that the ranch could be made profitable, but Sumner Gerard, Jr. did not and advised Decedent to sell the ranch. (App 104a, 106a). Sumner Gerard, Jr. told Decedent that unless Ennis was recapitalized, its chances of showing a profit were slight, and consequently he requested that Decedent

make additional capital contributions on many occasions after 1960. (App 105a).

In 1961, Decedent pledged additional shares of stock to Metals Bank on behalf of Ennis in order to allow the bank to release all or a portion of Sumner Gerard, Jr.'s collateral for his use in "some other enterprise" in which he was interested. (App 278a). Also, Decedent gave additional security for the Ennis loan in March, 1963. (App 31a).

As of March 27, 1963, Metals Bank advised Sumner Gerard, Jr. that the marketable securities held by it were in excess of the collateral required and offered to release his securities valued at $37,000. (App 261-264a). Metals Bank did release such securities later in the year and such securities were pledged to the First National Bank in Billings (the "First National Bank") on May 1, 1963, to secure a $45,000 loan which, in turn, was invested by Sumner Gerard, Jr. in Yellowstone Feed and Cattle Company. (App 260-263a; 75a; Exs. 136-137).

In 1961, Sumner Gerard, Jr. had invested $25,000 for a 50% equity interest in Yellowstone Feed and Cattle Company located in Billings, Montana. (App 69a). Yellowstone operated a feedlot which purchased cattle on credit, fed them, and made subsequent sales. (App 70-71a).

In order to finance the purchase and feeding of cattle, Yellowstone arranged a revolving line of credit with First National Bank. First National Bank required

personal guarantees of Yellowstone's obligations to the extent of $200,000 from Sumner Gerard, Jr. and the other major shareholder. (App 71-72a).

After making small profits in 1961 and 1962, Yellowstone sustained devastating losses of $89,062.29 in 1963 and $84,829.26 for 1964. (App 73a, 77a, 78a; Exs. 101, 102). Yellowstone's operating losses were the result of a decline in the market price of cattle in 1962 and 1963. (App 73-74a).

In order to protect his investment in Yellowstone and to postpone the risk of satisfying his personal guaranty, Sumner Gerard, Jr. had to contribute an additional $51,000 in capital to Yellowstone in 1963. (App 75-76a).

Sometime after becoming a resident of Montana, Sumner Gerard, Jr. became active in Montana State politics. He won election to the Montana State legislature in 1954. Thereafter, he was elected to two successive two-year terms in the State Legislature in 1957 and 1959. In the 1959 session, he served as minority leader of the House. (App 97a). In 1960, he waged an unsuccessful campaign for the Republican nomination from Montana for the United States Senate. (App 99a). He estimated his personal cost of the Senate campaign at $20,000. (App 100a). In 1961, he was elected to the Montana State Senate. He served two four-year terms in the Senate, and in 1964 served as its minority leader. (App 97a).

Decedent took an active interest in Sumner

Gerard, Jr.'s political career and encouraged him to continue in national politics. (App 98a, 119a, 120a, 244a). Decedent also made modest contributions to his son's campaigns and to other candidates recommended to him by his son. (App 99a). In the fall of 1963, Sumner Gerard, Jr. spoke to Decedent concerning his running for the State Senate in the election year coming up and discussed his political future and what he should do concerning it. (App 119-120a).

Sumner Gerard, Jr. and his wife Louise had five children, viz. Jennie, born in 1945; Molly, born in 1947; Helen, born in 1949; Anne, born in 1951; and Sumner, III, born in 1953. (App 88a, 108a). Sumner Gerard, Jr. decided not to utilize the rural educational facilities in the area of Montana where they lived for their children. It was decided to send the children to private schools in the East. (App 108a). Sumner Gerard, Jr. and his wife incurred increasing expenses for their children's education during the period from 1959 to 1963. (App 108a, 109a). The Gerard children's educational expenses from 1962 to 1964 were as follows:

Year	Annie Wright Seminary	Vassar College	Foxcroft School	Total
1962	$10,279.75			$10,279.75
1963	11,071.60	$1,700.00		12,770.60
1964	9,369.25	2,866.50	$1,930.62	14,166.37

(App 129-130a)

During the calendar years 1959-1963, Sumner Gerard, Jr. reported income on his Federal income tax returns in the following manner:

Year	Salary	Dividends	Interest	Net Capital Gains (losses) Before 50 Percent Deduction	Other	Total*
1959	$1,400	$12,821	$5,285	$43,694		$63,200
1960	5,489	12,604	2,854	1,117	$10,812	32,876
1961	5,403	11,308	5,387	(3,341)	1,078	19,835
1962	8,399	13,471	7,428	(21,180)		8,118
1963	1,874	14,139	9,078	(16,814)	403	8,680

(Exs. 123-127)

In addition, during the calendar years 1959-1963, Sumner Gerard, Jr. as a legatee of the Estate of Mary D. Gerard, received distributions of securities in the following amounts:

Year	Shares	Subject	Total Value Credited
1961	448	Aluminum, Ltd.	$11,984
1962	248	Creole Petroleum	9,982
1963	644	Crystal Oil	4,628
1964	48	Kennecott Copper	3,891
1965	248	Texas Utilities	24,676

(App 33a)

During the years 1962 to 1964, inclusive, Sumner Gerard, Jr. was short of cash to the extent that his expenditures regularly exceeded his sources of cash absent bank borrowing. He and his family were living substantially beyond their income on borrowed funds during that period.

*This column is a economic total only, not reflecting any limitation on the amount of allowable capital loss deductions for tax purposes.

(App 107a, 121a). Decedent regarded the financial obligations of his son as part of the Ennis operation. (App 101a, 141a) During the years 1960 to 1964, inclusive, Ennis' balance sheets (and the Ennis tax returns) reflected receivables in continually increasing amounts due from Sumner Gerard, Jr. for monies loaned by Ennis to him. (Exs. 104-108, 112-116, Exhibit A; App 267a). The monies borrowed from Ennis by Sumner Gerard, Jr. were to meet personal and family expenses. (App 104a, 136a, 141a). The year-end balances of his loan accounts with Ennis for the years 1960 to 1964 are as follows:

Year	Balance	Increase in Amounts Borrowed
1960	$16,714	
1961	23,456	$ 6,742
1962	40,405	16,949
1963	65,563	25,158
1964	83,426	17,863

(App 267a; Exs. 104-108, 112-116, Exhibit A)

Sumner Gerard, Jr. borrowed from other sources during these years. As of December 31, 1963, he had outstanding loans amounting to $167,563 (App 265a, 266a, 267a; Ex. 144) as follows:

Source	Amounts
First National Bank and Trust Co., Billings	$45,000
Midland Bank, Billings	37,000
Chemical Bank New York Trust Co.	20,000
Ennis Co.	65,563
Total Loans Outstanding	$167,563

(App 265a, 266a, 267a; Ex. 144)

In addition, Sumner Gerard, Jr. owed $2,860 on a brokerage margin account as of December 31, 1963. (Ex. 143). The total amount borrowed by Sumner Gerard, Jr. in 1963 (including his brokerage account) was $79,718. App 265a, 266a, 267a; Ex. 143; Ex. 115, Exhibit A) as follows:

Source	Amounts
First National Bank in Billings	$45,000
Midland Bank	6,700
Ennis	25,158
Brokerage Margin Account	2,860
	$79,718

Mrs. Sumner Gerard, Jr. had received approximately 30 shares of IBM stock from her parents, which increased, as a result of stock dividends to 54 shares in 1963. (App 93-94a, 260a). As of the end of 1963, these shares were pledged with Metals Bank on behalf of Ennis in securing cattle loans. (App 93-94a).

Decedent became increasingly aware of his son's financial problems since, on many occasions after 1960, Sumner Gerard, Jr. solicited his father for funds as his position got worse. (App 107-109a, 113-116a). Sumner Gerard, Jr. discussed his cash short position numerous times in 1963, just prior to the transfer in issue. He did this by phone or by personal visits to New York. (App 109a). On each such occasion that he saw his father during that period, he explained to him the increasing urgency of the situation, i.e., that his financial position was getting worse every year due to the fact that educational

expenses for his children were increasing each year as they became older, the expenses of the Senate race, the financial difficulty of the Ennis operation, and the fact that the Yellowstone cattle enterprise was not going very well. (App 108a, 109a).

Sumner Gerard, Jr. also asked Decedent on these occasions for additional capital for Ennis. He felt trapped at Ennis because the ranch did not provide a large enough base for his growing political activities or for his other business activities, and because Decedent remained in control of Ennis. Sumner Gerard, Jr. told Decedent that he wanted to liquidate the ranch operation at Ennis but Decedent refused. Decedent felt that his son's "place was on the ranch." (App 104-106a).

In the fall of 1963 and early 1964, Sumner Gerard, Jr. became aware of his father's intention finally to give him some form of assistance with his personal affairs. (App 112a). During this period, Sumner Gerard, Jr. either talked to his father on the telephone or saw him personally on a weekly basis concerning his need for financial assistance. The substance of their discussions centered in part on the problem of financing the education of Sumner Gerard, Jr.'s children. They discussed whether Decedent would provide assistance to his son and secondly, what form such assistance would take, if given. (App 116-117a). In 1963, Sumner Gerard's daughter Jenny was 18, his daughter Pamela was 16, his daughter Helen was 14,

his daughter Ann was 12, and his son Sumner III was 10. (App 88a, 108a).

Decedent had a keen interest in his grandchildren. (App 95a, 145a). He corresponded with them and discussed their education with Sumner Gerard, Jr. and his wife. (App 95a, 96a). In addition, Decedent gave substantial gifts to his grandchildren at Christmas time in amounts of $1,000 to $2,000 on a regular basis from 1960 through 1965. (App 128a).

From 1960 on, Decedent met frequently with his financial adviser and friend, Mr. Hugh V. Galusha, then a Montana lawyer and accountant. Mr. Galusha met with Decedent in the latter's home in New York City. Mr. Galusha usually stayed with Decedent in New York on trips from Montana. (App 133a). During these visits, Decedent expressed to Mr. Galusha concern over the financial condition of Sumner Gerard, Jr. Decedent stated to Mr. Galusha that he was worried about what was going to happen to his grandchildren. (App 145a).

In 1963, Mr. Galusha visited Decedent in New York during the summer and in the month of December. (App 138-139a). Decedent was told by Mr. Galusha that Sumner Gerard, Jr.'s family was "going down the drain". Mr. Galusha suggested that a transfer of capital from Decedent was necessary. (App 145a).

Decedent told Mr. Galusha that he would give Sumner Gerard, Jr. something against which his son could

borrow, but which he could not dispose of, i.e. collateral for a new kind of loan. (App 146-147a). Decedent also discussed with Mr. Galusha whether additional assets could be placed in Ennis and whether there were sources within Ennis that were free and available for further extensions of credit. Decedent wanted to know how much additional capacity there was in Ennis for further credit advances in terms of mortgages on land or advances against live-stock. (App 139a).

Decedent was told by Mr. Galusha that the capacity of Ennis to support additional loans "had been extinguished". Mr. Galusha suggested to Decedent that "transfusions" of independent collateral would become necessary. (App 141-145a). Mr. Galusha informed Decedent that about $60,000 was needed annually to continue to operate Ennis and that an extra $30,000 was needed to keep the family of Sumner Gerard, Jr. afloat. (App 142a).

Some time during 1963, after receiving Mr. Galusha's advice, Decedent told Mr. Galusha that he was going to transfer to Sumner Gerard, Jr. shares of stock in a family corporation called Aeon Realty Company ("Aeon"). (App 147a). Decedent also discussed with Mr. Galusha Decedent's appraisal of the personal situations of the abilities of his other two sons, Coster and James. When the transfer of capital to Sumner Gerard, Jr. of stock in Aeon was being discussed, Decedent indicated explicitly to Mr. Galusha that he would make similar gifts to his

other two sons. (App 153-154a).

In his discussions with Mr. Galusha concerning Sumner Gerard, Jr.'s financial problems, Decedent explained his concept of wealth and finance. Mr. Galusha had told Decedent that neither Ennis nor Sumner Gerard, Jr. could create more debt, since each of them were already in debt "up to their ears." (App 147a). Decedent told Mr. Galusha that he had no property that was not incumbered and that he believed in borrowing against property. (App 147a). Mr. Galusha questioned the use of Aeon shares as collateral. Decedent unfolded to him the story of Decedent's pattern of financing. Decedent said that he had been able to secure loans on a variety of collateral that were acceptable to New York banks. (App 148-149a).

Prior to the gift of Aeon stock, Decedent had developed a pattern of aiding Sumner Gerard, Jr. indirectly through Ennis. Decedent's advances of collateral to Metals Bank permitted additional loans to be made by the bank to Ennis upon which Sumner Gerard, Jr. in turn could draw. (App 247a, 267a). Decedent financed the Ennis operation by pledging personal securities to banks which secured loans made to Ennis. (App 102-103a). Decedent's advance of collateral in 1961 was motivated in part by a wish to have Metals Bank release Sumner Gerard, Jr.'s collateral for other business ventures.

(App 246a).

Sometime during the fall of 1963, Sumner Gerard, Jr. contacted Chemical Bank through his attorney to determine whether he would obtain a loan using shares of Aeon stock as collateral, although he did not own any Aeon stock at that time. (App 109-111a, 168-169a).

Chemical Bank indicated its willingness to loan Sumner Gerard, Jr. $25,000 per year up to "a couple of hundred thousand dollars," for the purpose of financing his children's education (App 172a, 178a). and that shares of stock representing a minority interest in Aeon Realty Company would be acceptable collateral to secure the loan. (App 168-169a). Chemical Bank valued 17 shares of Aeon Realty Company as collateral at approximately $500,000. (App 178a). Chemical Bank was aware of the underlying assets of Aeon. (App 167-168a, 169-170a).

On July 10, 1964, following transfer of 17 Aeon shares by his father to him, Sumner Gerard, Jr. forwarded all of the shares to Chemical Bank. In his letter sent to Chemical Bank at that time, Sumner Gerard, Jr. estimated that the stock had a market value of $950,000 for "tax purposes." (App 274a). Sumner Gerard, Jr. did borrow funds from Chemical Bank against his Aeon shares as collateral, and he continued to borrow funds from Chemical Bank on a periodic basis subsequently. As of the date of death, Sumner Gerard, Jr.'s loan balance with Chemical Bank, secured by Aeon stock, had reached

approximately $70,000 (Ex. 145; Ex. AB) and in latter years reached as high as $140,000. (App 270a).

Sumner Gerard, Jr. received dividend income from the Aeon shares of $3,936.00 in 1965 and $4,722.00 in 1966. (Ex. 129, 130). In addition, in October of 1964, approximately nine months after the transfer of the Aeon stock to Sumner Gerard, Jr., Decedent pledged an additional 100 shares of IBM stock with the Metals Bank. (App 182a). The same year, Ennis was able to borrow an additional $65,978 from Metals Bank. (App 267a; Exs. 115, 116, Exhibit A). Also in 1964, Sumner Gerard, Jr. was able to borrow $17,863 from Ennis. (Exs. 115, 116, Exhibit A; App 267a).

Decedent's medical history was presented fully to the Court below by Petitioners. Decedent was admitted as a patient to New York Hospital, 525 East 68th Street, New York, New York on four occasions prior to the date of his death as follows:

Date of Admission	Date of Discharge
August 7, 1959	October 25, 1959
December 18, 1964	January 6, 1965
December 5, 1965	December 13, 1965
February 7, 1966	March 10, 1966 (date of death)

(App 28a, 209-219a)

During Decedent's hospitalization for 79 days from August 7, 1959 to October 25, 1959 he was operated on for an acute gall bladder attack. Decedent then developed an intestinal

obstruction and had to be operated on again during the same period of hospitalization. (App 28a, 184-185a). He was then 85 years old. His next hospitalization did not occur until December 18, 1964, more than five years later. (App 27a, 28a).

Following the 1959 hospitalization, Decedent was in a weakened condition. It took Decedent three months to recuperate from the effects of the 1959 operations. (App 186a). Decedent did not make any taxable transfers during or immediately after the period of his operations and hospitalization in 1959. The gift of Aeon shares was made over four years later. (App 29a).

During the period from 1959 until the date of death, Decedent suffered from emphysema and chronic bronchitis. Emphysema is an over distension or over expansion of the lungs which interferes with the proper exchange of air. It results in a shortness of breath. (App 188a). Chronic bronchitis is an inflammation of the bronchial tubes, causing a cough and raising sputum. (App 188a). Decedent also had a recurring prostatic infection which affected his kidney and bladder, interfered with the passing of urine and sometimes caused a fever. It usually responded quickly to treatment. (App 187-188a, 196a). None of the above illnesses were terminal. None of his illnesses were such that they would have caused Decedent's death within a predictable period of

time. (App 189-190a). Decedent's emphysema and problems with his vision, however, for the most part kept him confined to his house, where he was attended by a day nurse. (App 188a, 196a).

Decedent's regular physician described his state of health in 1963 as "as good as one could expect for a man of his age with the illnesses he had." (App 192a). Between 1961 and 1964, Decedent's condition did not change materially. (App 202a, 203a). Although Decedent had emphysema and bronchitis which restricted his activity, he traveled to Ennis, Montana to visit the Ennis Ranch and the family of his son, Sumner Gerard, Jr. almost every summer, including the summers of 1960 and 1961. (App 94a, 199a).

Decedent's physician testified that, during his treatments of Decedent, Decedent never showed any signs of senility. (Opinion, pg. 756 ; App 186a). His correspondence shows an active mind and lively wit. (App 279a, 280a, 244a, 245a, 246a). In a letter to his opthamologist, Decedent included the following postscript: "P.S. I think the emphysema is the result of running the 440 yard race as a member of the Yale Track Team. My lungs were overexpanded and lack of exercise tended to allow them to collapse." (App 279a).

When Decedent was 85 or 86 he at one time saw his physician whose records indicate that Decedent visited on that occasion "...primarily...because he has been a little dizzy recently and wonders if he is going to have

a stroke...." (Opinion, pg. 755; App 195a). Decedent's physician also testified that it was not at all uncommon on the part of a patient of advanced age to be concerned about having a stroke. (App 195a). Extensive medical records of Decedent's visits with physicians are devoid of any futher references to this particular fear. In addition, Decedent at one point during 1963 developed abdominal pains and he had expressed fear on that occasion to his physician that he might be suffering from cancer. (App 194a, 195a). However, in May 1963, he was x-rayed, and the x-rays proved negative, i.e., that he was not suffering from cancer. (Opinion, pgs. 755-756; App 194a).

Decedent made no taxable gifts prior to the gift of January 2, 1964, other than certain gifts in trust for his three sons made in 1935 which were in the aggregate amount of $170,998. (App 29a; Ex. A, Sch. G). Following the gift of January 2, 1964, Decedent gave to each of his sons rights to certain Alabama mineral interests valued at $6,883.33 and interests in Texas property of the Estate of Mary Gerard, valued at $21,987.33. (App 3a; Exs. B, C).

After deciding to transfer the Aeon stock as a gift, Decedent became concerned with raising the money, approximately one million dollars, which he believed was required to pay a gift tax. He particularly objected to parting with such a large sum of his own money and stated to Mr. Galusha that the raising of the money to

pay the gift tax posed a problem. (App 150a, 152a, 174a). The question of payment of the Federal estate tax, according to Mr. Galusha, never concerned Decedent very much. (App 152a). Decedent eventually raised the money to pay the gift taxes by borrowing the funds from Chemical Bank, pledging certain shares of IBM stock as collateral. (App 173- 174a).

On February 7, 1966, Decedent was admitted to the hospital with an intestinal obstruction. He responded to treatment and was considered ready for discharge on February 28, 1966. (App 216a). However, Decedent suffered a relapse and died on March 10, 1966 of an intestinal hemorrhage. His physician testified that it was not predictable as of 1959 or 1960 that an intestinal hemorrhage would be the cause of Decedent's death. (App 189-190a).

ARGUMENT

SUMMARY

Decedent's gift of 51 shares of stock of Aeon Realty Company, in equal amounts to his three sons on January 2, 1964 was not a gift in contemplation of death because:

1. Decedent's impelling motive for the Aeon gift was to provide financial assistance for his son, Sumner Gerard, Jr., providing him with collateral for additional loans;

2. Decedent in giving equal gifts to his other two sons was motivated by the wish to treat his other two sons fairly;

3. Decedent's impelling motives for his gift of the Aeon shares were not asscciated with motives in contemplation of death.

DECEDENT'S IMPELLING MOTIVE FOR THE AEON GIFT WAS TO PROVIDE FINANCIAL ASSISTANCE FOR HIS SON SUMNER GERARD, JR. AND TO MAINTAIN FAMILY HARMONY BY EQUALIZING GIFTS TO HIS OTHER TWO SONS

The language of Section 2035 provides that the value of the gross estate shall include the value of all property transferred in contemplation of death. Section 2035 further creates a rebuttable presumption when a decedent transfers property as a gift within the three

years preceding the date of his death. The presumption created by Section 2035 is one of law, not of fact. Flannery v. Willcuts, 25 F.2nd 951, at 953 (8th Cir., 1928). A presumption of law is not evidence in and of itself. Gillette's Estate v. Commissioner, 182 F.2d 1010 (C.A. 9, 1950). The Court below has correctly stated that the party challenging the determination of the Commissioner must not only come forward with evidence to rebut the statutory presumption but also to carry the taxpayer's burden of proof. 57 T.C. 757. The presumption of Section 2035(b) has no probative force where there is evidence to support a contrary finding in the record. The presumption in that instance is not treated as evidence, and it does not have any effect on burden of proof, an entirely different concept. Hemphill Schools, Inc. v. Com'r of Internal Revenue, 137 F.2d 961, 964 (7th Cir. 1943); Gillette's Estate v. Commissioner, supra.

The principle regarding the effect of a presumption was accepted by the courts at an early stage in contemplation-of-death cases. Flannery v. Willcuts, supra. The Flannery case involved a review of a lower court finding that the gift of a 75-year old decedent had been made in contemplation-of-death within the meaning of Section 402(c) of the Revenue Act of 1918, a predecessor statute of Section 2035. The

operative language of Section 402(c), supra, stated:

> (c) . . . Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. (Emphasis added) 252 F.2d at 952

The emphasized language of Section 402(c), supra, which created the presumption, is identical to the language found in Section 2035 of the Code.

The Court in Flannery held in effect that in a contemplation-of-death case the legal effect of the statutory presumption created by Section 2035(b) was to cast upon the taxpayer the duty of producing some evidence to the contrary. When that was done, the Court held, the presumption was extinguished. 25 F.2d at 953.

Since Petitioners have adduced evidence which would support a finding contrary to the presumption of Section 2035(b), the normal rules of burden of proof apply. It is submitted that this Court must overrule the Tax Court decision, as clearly erroneous, if Petitioners have shown by a fair preponderance of the evidence, that the predominant motives of Decedent for making the gifts involved herein were associated with life rather than with motives predominantly associated with a gift in contemplation-of-death within the meaning of Section 2035. Estate of Errett Ross Crum, T.C. Memo, 1969-187; Wickwire v. Reinecke, 275 U.S. 101 (1927).

In a contemplation-of-death case, a taxpayer has the burden of proof to show that the gifts were impelled by life motives. United States v. Wells, 283 U.S. 102 (1931).

It is Petitioners' contention in this case that the decision of the Court below was clearly erroneous since such a showing has been made in this case both by the uncontroverted statements made by Decedent to an independent, credible witness with respect to Decedent's intentions in making the gift, and by the surrounding circumstances.

While the Tax Court did consider Decedent's desire to provide financial assistance to his son, Sumner Gerard, Jr. and to equalize his gifts to maintain family harmony, it found that "...these factors above are not decisive..." and are "...of little probative value in determining the decedent's motive for the transfer of Aeon stock to his sons." (Opinion, p. 759).

The Court below found, rather, that age, health, absence of a pattern of gift-giving, the type of property given and Decedent's overall testamentary pattern were factors to be given decisive weight in this case. As will be shown, these considerations were neutral at best in the context of facts of this case. The dominant motive behind the gift of Aeon shares on January 2, 1964, considering all of the facts and circumstances, centered upon the financial situation facing Decedent's son,

Sumner Gerard, Jr. In 1963, just prior to the gift in question, Decedent became increasingly aware of the untenable financial position of his son, and this awareness was the impelling motive to make the gift in question.

In 1948, Decedent purchased The Ennis Company. Sumner Gerard, Jr. and his family moved to the ranch in 1948. (App 90a). They operated it at all relevant times thereafter. The ranch operated by Ennis never showed a profit. (App 134a). Decedent took income tax deductions for losses of Ennis and its predecessors, as a partner in 1954 through 1958, and thereafter as a Subchapter S stockholder. (App 155a, 160a). Decedent showed an interest, however, in making Ennis profitable. Decedent encouraged his son to make the ranch a financial success. (App 94a, 103a, 104a, 147a). Decedent also took an interest in ranching economics. (App 103a, 104a, 244a, 245a). Decedent maintained his optimistic view in spite of the repeated urgings of Sumner Gerard, Jr. that the ranch be recapitalized or sold. (App 104a).

Sumner Gerard, Jr. and his wife were not able to make the Ennis operation profitable. During the period from 1959 through the date of death on March 10, 1966, Ennis continued operations through loans from Metals Bank. (Exs. 111-118).

During the 1950's Sumner Gerard, Jr. became active in Montana politics. He was elected to the

legislature in 1955. Subsequently, he was re-elected to two successive two-year terms, and was elected minority leader of the House in the 1959 session. (App 97a). In 1960, he ran for the Republican nomination to the United States Senate. He was defeated in a costly campaign. (App 99-101a). Thereafter, Sumner Gerard, Jr. was elected to the Montana State Senate. He served two four-year terms in the State Senate, part of that time as minority leader. (App 97-98a). His political career was aided and encouraged by his father, who contributed to some extent to the campaigns and to campaigns of candidates recommended by his son. (App 99a).

Sumner Gerard, Jr. also became involved in other business interests in 1960 and 1961. In 1961, Sumner Gerard, Jr. invested $25,000 in Yellowstone Feed & Cattle Co. ("Yellowstone") located in Billings, Montana. (App 69a). Yellowstone was heavily leveraged and highly speculative. (App 71a). Unfortunately, the price of cattle began to decline in mid-1962, and consequently, Yellowstone found itself in serious difficulty. (App 74a). Yellowstone lost over $89,000 in 1963 and $84,000 in 1964. (Exs. 101, 10_; App 77a, 78a). Sumner Gerard, Jr. had, with another principal in Yellowstone, personally guaranteed Yellowstone's bank loan obligations up to $200,000 (App 72a) and, in fact, he had to satisfy that personal guaranty in 1967. (App 86a). Sumner Gerard, Jr. therefore found it necessary to protect his Yellowstone

investment by providing an additional $51,000 for Yellowstone during 1963. (App 75-76a).

In addition to Ennis and Yellowstone losses, he began to incur high educational expenses during the period from 1959 to 1963. (App 108-109a, 129-130a). Sumner Gerard, Jr. and his wife had determined that the rural secondary educational facilities of Montana would not be adequate to educate their five children. They decided to send their children away to private schools. (App 108a). Decedent had been consulted in this connection. He concurred in the family decision. (App 95-96a).

Educational expenses for Sumner Gerard, Jr.'s children for the years 1962-1964 increased at the rate of approximately $2,000 per year, rising from more than $10,000 in 1962 to over $14,000 in 1964. (App 129-130a).

Sumner Gerard, Jr. was concerned about the impact of educational expenses on his available sources of funds. In 1963 the ages of Sumner Gerard, Jr.'s children were 18, 16, 14, 12 and 10. (App 88a, 108a). At least ten more years of educational expenses would be necessary before his only son, Sumner Gerard, III, who was 10 years old in 1963, might be expected to graduate from college.

During the period from the end of 1960 through January 2, 1964, the date of the Aeon stock gift, Sumner Gerard, Jr. sustained his family, operated a ranch which lost money every year, and maintained an active political career,

on an annual income never exceeding $20,000. His tax returns show that his income was primarily derived from a trust established for him by Decedent in 1935, salary in some years from Ennis, and dividend income and capital gains from the sale of securities. (Exs. 121-128).

Sumner Gerard, Jr. had acquired a securities portfolio from capital distributions of the Estate of Mary D. Gerard.[2] (App 33a). He maintained a diversified portfolio during the years 1959 to 1966.[3] An increasing proportion of his securities portfolio (more than 90% by May of 1963) was pledged[4] to secure

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[2]Decedent's elder brother was James W. Gerard; Mary D. Gerard was the widow of James.

[3]Sumner Gerard, Jr. actively traded his securities. However, he incurred capital losses as a result of his stock transactions in 1961, 1962 and 1963 in the amounts of $3,341.99, $21,180.58, and $16,814.25, respectively. (Exs. 125, 126, 127, Schedule A-1).

[4]Sumner Gerard, Jr. made periodic reviews of his financial position during the period from 1960 until 1963 by means of contemporaneous, handwritten notes. (Exs. 134-138). These notes list his securities held, their market value, the banks at which particular securities were pledged and, in some cases, his outstanding loan balances. These handwritten notes represent the only evidence as to which of Sumner Gerard, Jr.'s securities were pledged on a specific date. All other records were destroyed in a fire which destroyed the ranch house and its contents at Ennis on December 3, 1965. (App 79a). Sumner Gerard, Jr. also borrowed extensively from Ennis, a fact of which Decedent was aware. (App 101a, 267a; 111-118, Exhibit A). For a period until March, 1963, his marketable securities were pledged at Metals Bank to secure loans to Ennis. (Exs. 134-137, 114; App 269a). Sumner Gerard, Jr.'s notes made in May, 1963, show that over 90% of his marketable securities had been pledged to secure bank loans, (either his own or those of Ennis). (App 121a; Ex. 134).

bank loans during the period from 1961 through 1963. (Exs. 134-137; App 269a).

Although Decedent had never made substantial gifts of free assets to his sons,[5] he had assisted Sumner Gerard, Jr. financially prior to the gift of Aeon shares on January 2, 1964, through a pattern of loans in lieu of outright gifts. (The eventual transfer of Aeon shares by Decedent to Sumner Gerard, Jr., as will be demonstrated, was consistent with this form of indirect assistance).

Decedent knew that Sumner Gerard, Jr., in the period from 1961 to 1963, was borrowing heavily from Ennis. Sumner Gerard, Jr.'s loan from Ennis increased from $23,456 as of December 31, 1961 to $65,563 on December 31, 1963. (App 267a). Decedent during this period advanced securities as collateral to Metals Bank, which was Ennis' bank. The collateral advances by Decedent, which permitted increased loans to Ennis from Metals Bank, in turn allowed Sumner Gerard, Jr. to borrow additional funds from Ennis. The same advances of collateral provided Decedent with the benefit of continued Subchapter S losses. The collateral advanced from 1960 through 1963

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[5]Sumner Gerard, Jr. testified on cross examination that Decedent gave him and his brothers nominal Christmas gifts of $25.00 each. Decedent was far more generous with his grandchildren, making cash gifts to them of $1,000 to $2,000 annually. (App 127a, 128a). It also has been stipulated that Decedent set up trusts in the aggregate value of $170,998 for his sons in 1935. Decedent did not thereafter, until January 2, 1964, make any taxable gifts. (Ex. A, Schedule G).

to Ennis therefore served two purposes, each of which evidenced strong living motives. The collateral provided Sumner Gerard, Jr. with sources of funds to support the ranch, maintain his home, stay in politics, and educate his children at private schools. It also provided a tax deduction to Decedent as long as Ennis operated at a loss.

That Decedent was aware that his collateral advances provided assistance to his son is evidenced by an excerpt from a letter written by Decedent to the president of Metals Bank on August 4, 1961. Decedent on that occasion informed the bank that he was forwarding 100 shares of IBM to the bank as additional security against the Metals Bank loan to Ennis and added that,

> Another objective is that after my additional shares are put up you may release and return to Jerry [Sumner Gerard, Jr.] and his wife all or the greater portion of their securities. Then Jerry can use such returned securities in furthering some other enterprise in which he is interested. (App 246a).

In 1963, collateral was released to Sumner Gerard, Jr. (App 261a, 263a). The release permitted Sumner Gerard, Jr. to borrow funds from another bank to protect his investment in Yellowstone.

As noted earlier, Yellowstone was in serious difficulty in 1963 due to a falling cattle market. Sumner Gerard, Jr. had contingent personal liabilities in Yellowstone obligations to the extent of $200,000. When it became clear in 1963 that Yellowstone required additional capital

the following events occurred.

Decedent advanced 200 shares of stock of IBM to Metals Bank on March 21, 1963 to provide further collateral for the loans of Metals Bank to Ennis. (App 181-182a, 31a). When Metals Bank received the additional collateral from Decedent, Metals Bank released to Sumner Gerard, Jr. his own marketable securities. (App 263a, 264a). Sumner Gerard, Jr. then pledged his securities to a Billings, Montana bank in April, 1963, to secure a $45,000 personal loan. (App 265a, 269a). Sumner Gerard, Jr. then advanced that amount to Yellowstone on May 1, 1963. (App 75a). This recapitalization of Yellowstone helped it to avoid liquidation, and to postpone (until 1967) Sumner Gerard, Jr.'s joint and several contingent liabilities in the amount of $200,000. It also made his financial situation more perilous.

Decedent's assistance to Sumner Gerard, Jr. in the Yellowstone crisis was consistent with Decedent's view of borrowing and credit. A financial advisor of Decedent, then a Montana accountant and lawyer, Mr. Hugh D. Galusha,[6] testified that Decedent borrowed heavily and had a complicated structure of debt financing. (App 147-149a). A Chemical Bank officer, Mr. Donald Platten, testified that Decedent intended to and did borrow the funds to pay the nearly one million dollars of gift tax due on the gift

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[6]Mr. Galusha at the time of trial was the President of the Ninth Federal Reserve District. (App 132a).

of Aeon shares. (App 173-174a). Decedent habitually used indirect methods to provide financial assistance to Sumner Gerard, Jr. and his family. (App 102-103a). Decedent set up a debt structure for Sumner Gerard, Jr. which followed Decedent's own pattern.

Sumner Gerard, Jr. concluded by 1960 that Ennis could not be made profitable. (App 104a). He had tried, perhaps unwisely in retrospect, to make up the Ennis loss by pursuing highly speculative investments, such as Yellowstone. He had also tried, unsuccessfully, to convince Decedent to sell Ennis.[7] (App 104-105a). Sumner Gerard, Jr. testified that he communicated his anxiety with regard to his financial position, and as to his children's educational expenses, to Decedent on many occasions. (App 107-110a).

As a result of pressure from his son, Decedent began to feel growing concern over his son's financial plight and increasing anxiety about the educational future of his grandchildren. Sumner Gerard, Jr. testified that his father had always been extremely interested in and fond of his grandchildren. Decedent corresponded with them regularly and at length. (App 95a). In contrast to his gift-giving habits regarding his sons, Decedent had been demonstrably generous toward his grandchildren, having given them gifts of between $1,000 and $2,000 annually. (App 128a).

Decedent eventually expressed his concern about

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[7]Sumner Gerard, Jr. testified that he felt "trapped" at the Ennis ranch. (App 106a).

Sumner Gerard, Jr.'s worsening financial position and Decedent's worry about his grandchildren during conversations with his financial adviser, Hugh D. Galusha. These conversations occurred at meetings between them in the years 1961 through 1963. (App 142-149a). During the conversations with Mr. Galusha Decedent clearly expressed his intent to use a gift of Aeon stock to assist Sumner Gerard, Jr. and his family. Mr. Galusha testified as follows:

THE COURT: * * *	Do you recall what Mr. Gerard Senior said to you and what you said to him?
THE WITNESS:	"What's going to happen to Jerry?"
THE COURT:	And you [he] said?
THE WITNESS:	"I'm worried about my grand-kids."
THE COURT:	And what did you say to him?
THE WITNESS:	I said, "I share your apprehension."

BY MR. CAMPBELL:

Q	Did you say anything else to him?
A	I said, "They are going down the drain."
Q	Did you suggest to him any way of preventing that dire result?
A	That they needed a transfusion of new capital.

With regard to the form of the the financial assistance (App 145a), Mr. Galusha testified further concerning his conversations with Decedent as follows:

THE WITNESS:	It was a continuing problem. He said to me that he wanted to help Jerry out. He was con--he did not

want Jerry to have control, the right to dispose of property.* * * Mr. Gerard explained to me his pattern of financing. He explained to me the system of mortgaging property believed--he said to me, I have no property that isn't encumbered. I believe in borrowing against property. I particularly want to give Jerry something against which he can borrow, but which he cannot dispose of, that will give him the collateral for a new kind of loan.

I told him this to a country boy was awfully hard to understand, that the creation of debt to me was intolerable, and that the Ennis Company and the Gerard, Junior family was in debt up to their ears with little likelihood of working out and he said that I have faith that Jerry will be able to do it. He has the ranch under control, about which I expressed my misgivings. He has other kinds of investments going, and some of these are going to pay off.

Q Did Mr. Gerard, Senior mention to you any property he proposed to use for the transfusion you mentioned?

A Yes. He was going to transfer shares of stock in one of their family corporations called Aeon, or-- pronouncing it correctly.

Q Were the a -- the company you previously mentioned in your testimony as Aeon Realty Company, a New York corporation?

A Yes.

(App 146-147a)

Decedent also expressed to Mr. Galusha his reason for making similar gifts of Aeon stock to his other two sons. Mr. Galusha testified as follows:

Q * * * do you remember any conversations with regard to so-called transfusions to other members of the family than Sumner Gerard, Junior?

A Yes.

Q What were those conversations?

A When money was advanced to the Ennis Company, prior to 1963 by Mr. Gerard, he always said, "What am I going to do for the other two boys?" When the transfer of capital to Jerry of stock in Aeon Corporation was being discussed he said, "I have to make a similar gift to the other two boys," and then he discussed with me his appraisal of their personal situtions and their ability to earn a living.

(App 153-154a).

The record, therefore, shows that Decedent chose to assist his son by a gift of Aeon shares to "give him collateral for a new kind of loan."

The Court below reached a different conclusion, however, and stated that in its judgment the Aeon stock was "...not the most suitable vehicle for providing..." financial assistance to Sumner Gerard, Jr. (Opinion 761). The Court below discussed this question with Mr. Galusha, who was himself the director of a bank in Montana in 1963. Mr. Galusha testified that Decedent believed in borrowing. In response to the Court's question concerning the utility of Aeon shares for securing bank loans, Mr. Galusha responded:

THE WITNESS: It has been a long tradition, I found out. Mr. Gerard unfolded the history of his pattern of

> financing. He was able to secure loans on a variety of instruments and pieces of security that were foreign to me, but apparently were acceptable to the banks with which he did business.
>
> (App 149a)

Petitioners contend that the Court below ignored both Mr. Galusha's testimony and Decedent's pattern of financial assistance to his son, substituting the Court's subjective judgment in place of Decedent's motives.

The record below demonstrates clearly that Decedent knew the extent and nature of Sumner Gerard, Jr.'s financial crisis. Decedent knew that Ennis had never been profitable and was operating at a loss in 1963. Decedent also knew that Sumner Gerard, Jr. was heavily in debt. Decedent's indirect assistance to Sumner Gerard, Jr. in 1963 indicated that Decedent also knew that Sumner Gerard, Jr.'s involvement with Yellowstone was at a critical stage.[8]

Petitioner also contends that the record below shows that Decedent gave shares of Aeon stock to his on January 2, 1964 because he believed that the Aeon shares would be acceptable collateral for a bank loan and that debt financing was a legitimate means of obtaining required funds. This conclusion is supported by Decedent's statements to Mr. Galusha. It is also supported by

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[8] See page 33 herein describing Decedent's assistance to Sumner Gerard, Jr. in 1963 in the Yellowstone crisis

Sumner Gerard, Jr.'s conduct when he learned of the forthcoming gift.

When Sumner Gerard, Jr. was advised that he might receive a gift of Aeon shares, in 1963, his attorney approached a senior officer of Chemical Bank who had been familiar with Decedent's assets in general, and with the assets of Aeon in particular, to determine whether Sumner Gerard, Jr. could borrow funds secured by Aeon shares for the avowed purpose of obtaining funds for educational objectives.

Mr. Donald C. Platten testified that he had been approached in the fall of 1963 while serving as a vice president of Chemical Bank's 51st Street branch in New York City by Sumner Gerard, Jr.'s attorney. Mr. Platten testified at this time that Chemical Bank would accept Aeon shares as collateral. Mr. Platten testified further that the Bank was willing to extend the loan based upon Mr. Platten's knowledge of the Gerard family and upon his knowledge of the real estate assets of Aeon. Mr. Platten testified that for purposes of securing a bank loan, Chemical Bank valued the 17 shares of Aeon stock at approximately one-half million dollars.* Mr. Platten also testified that the Bank was willing to lend Sumner Gerard, Jr. up to $25,000 per year during the anticipated long period of educational expenses on the basis of the security provided by the Aeon shares as collateral. He estimated that the Bank would expect the educational loan to reach "a couple of hundred thousand

*The value of Aeon stock at the date of death was stipulated by the parties to be $40,996 per share (Opinion, pg. 756) so that 17 shares were deemed to be worth $696,932 some two years and two months after the transfers in question had occurred.

dollars." (App 179a).

In making his decision to transfer shares of Aeon stock, Decedent was aware, apparently, about the impact of such a gift on future federal estate tax. (App 152a). Decedent, however, was more concerned, in arranging for the payment of the gift tax.[9] In fact, Decedent, again acting exactly in character, borrowed the nearly one million dollars required to pay his 1964 gift tax, in April, 1965, one year and three months after the gift was made on January 2, 1964.[10]

The Court below recognized that a decedent's desire to provide financial assistance to an offspring has been clearly recognized as a basis for not making a transfer in contemplation-of-death. The Court below also stated that it was clear that a decedent's intent to be fair to other offspring and to maintain family

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[9]The Court below asked Mr. Galusha "...was there any discussion at all that the amount of the estate tax would even be greater than the amount that concerned Mr. Gerard as to the gift tax?

"THE WITNESS: He was concerned, obviously, your Honor, about the amount of the estate tax that would be involved, but the only concern he had about which he was vocal to me was where was the money coming from to pay the gift tax. Who would pay the estate tax never concerned him very much." (App 152a).

[10]Decedent could have made the gift in 1963. Had he done so, however, he would have been liable for the gift tax on April 15, 1964. By deferring the gift until January 2, 1964, he delayed the payment of the gift tax until April 15, 1965. He eventually did pay the gift tax, in April, 1965, with borrowed funds. The one-year delay in filing a gift tax return, which saved Decedent a year's interest on the Chemical Bank loan obtained by Decedent to satisfy his gift tax liability, manifestly evidenced a life motive.

harmony by giving equal gifts to all his children has also been considered to be a motive associated with life. (Opinion, pg. 759).

The Court below, however, found Decedent's alleged motive to offer financial assistance to his son Sumner Gerard, Jr. and to make equalizing transfers to his other sons to be of little probative value in the context of the case. It said that,

> "...the age of the decedent, the state of his health, and the fact that he was fearful that he might be facing a terminal illness, make it inconceivable that the transfers were not induced by the realization that death was near at hand." (Opinion, pg. 760).

Age alone has been rejected as sufficient reasons for a court to find that a gift was made in contemplation-of-death.[11]

In Allen v. Trust Co. of Georgia, 326 U.S. 630

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[11] In Estate of Maggie Holding, 30 T.C. 988 (1958) Aq. C.B. 1958-2, 6, decedent was 87 years of age. The court stated, at p. 994:

> Of course, it is undoubtedly true that when an individual reaches the age that decedent had reached when he made the gifts he knows that he is "nearing the journey's end," but that does not mean that gifts of the kind which decedent made in the instant case were made in contemplation of death or as a substitute for a testamentary disposition. Notwithstanding the age of the donor, the dominant motive for such gifts may be associated with life rather than with death.

A sampling of the cases shows that courts have found predominating life motives when decedents were 85 years of age. Bradley v. Smith, 114 F.2d 161 (7th Cir.

(Cont'd)

(1946) the Supreme Court commented, at 326 U.S. 635, that,

> On the other hand, every man making a gift knows that what he gives away today will not be included in his estate when he dies.

Decedent's health at worst was a neutral factor in this case. Decedent was approximately 89 when he transferred shares of Aeon stock to his sons on January 2, 1964 and had emphysema, bronchitis and recurring prostatic infection. None of those illnesses, which for the most part kept Decedent confined to his home, stopped him from traveling to Montana in the summers of 1960 and 1961. In fact, Mr. Galusha testified that during a visit with Decedent near the Christmas holiday in 1963, shortly before the Aeon stock was transferred on January 2, 1964, Decedent and Mr. Galusha attended a choir concert together in New York City. (App 138-139a).

Decedent's personal physician testified that none of Decedent's afflications were terminal. Decedent's physician also testified that none of Decedent's illnesses would have caused death within a predictable period. The

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1940); Estate of AdelaideStitt, 7 T.C.M. 920 (1948); 86 years of age, Estate of N.C. Foster, 25 B.T.A. 414 (1932); 87 years of age, Lockwood v. United States, 181 Fed. Supp. 748 (S.D.N.Y. 1959); Estate of Maggie Holding, 30 T.C. 988 (1958); Aq. C.B. 1958-2, 6; 88 years of age, Estate of Asa L. White, 15 B.T.A. 470 (1929) Aq. C.B. VIII-2, 56; 90 years of age, Estate of Oliver Johnson, 10 T.C. 680 (1948); 97 years of age, Oliver v. Bell, 103 F.2d 760 (3rd Cir. 1939); and 101 years of age, Kniskern v. United States, 323 F. Supp. 7 (S.D. Fla., 1964).

hospital records of Decedent's final hospitalization (App 216a) which commenced on February 7, 1966 show that Decedent died of complications resulting from an intestinal blockage. The records show that Decedent had even been considered ready for discharge on February 28, 1966 having responded favorably to treatment. (App 216a). Death was unexpected.

Assuming the Court below to be correct in its de-emphasis of Decedent's motives in offering financial assistance to his sons and its emphasis upon Decedent's age, health, and fears of a terminal illness, the most likely time for a transfer by Decedent of Aeon shares to his sons was in 1959.

Decedent at age 85 was admitted as a patient to New York Hospital on August 7, 1959 and discharged on October 25, 1959. During this hospitalization of 79 days, he was operated on for an acute gall bladder attack. Decedent then developed an intestinal obstruction and had to be operated on again during the same period of hospitalization. (App 28a, 184-185a). His next hospitalization did not occur until December 18, 1964, more than five years later. (App 28a).

Following the 1959 hospitalization, Decedent was in a weakened condition. It took Decedent three months to recuperate from the effects of the 1959 operation. (App 186a)

If Decedent had been primarily motivated by

thoughts of impending death, the obvious time to distribute his wealth would have been prior to or immediately following his serious operation in 1959. There was, however, no apparent reason connected with living motives for him to make a transfer in 1959. Ennis had just been reorganized into a Subchapter S corporation. Sumner Gerard, Jr.'s financial position in 1959 was relatively stable.[12] Sumner Gerard, Jr. had also recently received capital distributions from the Estate of Mary D. Gerard. (App 33a). His political career had not yet put a serious strain on his finances. Moreover, Sumner Gerard, Jr.'s oldest child was 13 years of age in 1959; educational expenses had not yet become severe. In addition, Sumner Gerard, Jr. had not yet made his investment in Yellowstone and had not guaranteed Yellowstone's obligations.

Four years later, in 1963, the situation had changed dramatically. Decedent acted by giving gifts of Aeon shares only after the stark facts of his son's financial crisis had been called to his attention from several sources. The education of five of Decedent's grandchildren was an immediate financial problem.[13] Ennis could not incur any additional debt. Yellowstone was on the brink

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[12]Sumner Gerard, Jr. had $63,000 in income in 1958 before the 50% capital gains deduction. Page 10, infra.

[13]The children of Decedent's oldest son, James W. Gerard, II, on January 2, 1965 were two and one years old. The children of his third son, Coster, on the same date were four, three, two and one. Their education expenses were distant and their financial conditions dissimilar to Sumner Gerard, Jr. (App 268a).

of collapse. Sumner Gerard, Jr.'s capacity to secure additional loans was near exhaustion, and his income had plumeted (Pg. 10, infra). During this period of time, there was no significant changes in Decedent's health. (App 202a, 203a).

The Court below, it is submitted, made a further error with respect to Decedent's alleged testamentary intent in making gifts in contemplation-of-death.

The Court determined that "...with the transfers in question, the gifts were in the same proportion as the subsequent division of the estate provided for in the will. This entire pattern of activity and the identical proportionality in each instance also indicates that the transfers were testamentary in nature." (Opinion, p. 760).

The Court's conclusions are incorrect. Decedent's testamentary pattern, with respect to his sons and their respective families, is set forth in his Will (App 220a), viz. (1) Decedent specifically bequeathed his tangible personal property to his sons in equal shares, (2) Decedent bequeathed to each son a legacy of $25,000, (3) Decedent specifically devised to his sons in equal shares his mineral and real property interests (which gift proved to be of little or no value as virtually no property of Decedent passed thereunder), and, after providing for certain cash legacies to designated individuals, a pecuniary trust to pay annuities to two of his employees, and a gift to charity of an amount equal to 10% of his gross estate, (4) Decedent left his residuary estate in

three equal trusts, one for the benefit of each son and his family. Decedent's will named the three sons and Chemical Bank as trustees of each of the residuary trusts, and they all qualified and are acting as such. As to each residuary trust created for a son and his family, Decedent's will (1) authorizes (a) the corporate trustee, in its sole discretion, to "spray" the net income (any income not so "sprayed" to be added to trust principal) and (b) the trustees other than the son who is a beneficiary of such trust (who is barred by New York law from participating in any such discretion) to "spray" the trust principal, to and among a class consisting of the son, his spouse named in Decedent's will and his issue (of whatever degree) living from time to time, (2) permits the son to withdraw up to 5% of the trust principal annually, and (3) to the extent that the trust principal shall not be effectively appointed to or for the son's issue by him, by deed or by his will, directs that the principal remaining on hand at the death of the survivor of the son and his spouse named in Decedent's will shall be divided into separate shares for the son's then living issue, such division to be on a per stirpes basis, each such share to be held in separate trust for the lifetime of that grandchild or more remote issue of Decedent for whom such share shall have been so set apart, with discretion in the

trustees thereof to "spray" the net income and principal thereof to and among a class consisting of such grandchild or more remote issue of Decedent, his or her spouse and his or her issue living from time to time, with ultimate remainder over upon the death of such grandchild or more remote issue of Decedent to his or her then living issue per stirpes.

In contrast, therefore, to Decedent's gift outright of Aeon stock to each of his sons more than two years preceding his death, Decedent upon his death left substantially all of his property in trust. The ultimate remaindermen under the three trusts are Decedent's great-grandchildren or more remote issue, not Decedent's sons.

The facts of this case are, indeed, more compelling and more definitely demonstrate uncontradicted living motives than many cases in which Petitioners have met their burden of proof. For example, in Lockwood v. United States, supra, the Court stated:

> The decedent was of rather advanced age, being over 87 years old when the gift was made. Only about 9 months intervened between the gift and death. The decedent had been hospitalized at numerous times prior to his death for ailments of varying degrees of seriousness. The beneficiaries of the Trust were the natural objects of the decedent's bounty. Further supporting the defendant's arguments is the absence of many of the ordinary life motives for making a true inter vivos gift. Thus, the donees had no necessity for increased income since they were financially secure. Also, there was no motive for the decedent to desire the donees to obtain experience in management of the property since the

> decedent's son, the Trustee, had proved himself a man of business acumen. In addition, divestiture of the cares of management could not have induced the gift since the decedent retained a substantial portion of the property which was the subject of the gift. (181 F. Supp. at 750).

In Lockwood, the court, with respect to the state of Decedent's health, said that,

> Thus, even though the decedent had been hospitalized on numerous occasions, there was no indication that any of the ailments suffered was of such a type as to cause apprehension of impending death. (181 F. Supp. at 750).

The court in Lockwood held that Decedent had been motivated to effect a transfer due to a desire to avoid income taxes. In accepting that motive, the court relied on the testimony of Decedent's son and the nearly simultaneous purchase by Decedent of an annuity. In this case, Decedent's motives, the desire to assist his son Sumner Gerard, Jr. and his family to solve the acute financial crisis precipitated by the sequence of events which occurred from 1959 to 1963, and the desire to be fair to his other sons, are motives associated with life.

The gift of an aggregate of 51 shares of Aeon by Decedent on January 2, 1964 was not a "gift in contemplation of death" within the meaning of Section 2035 of the Internal Revenue Code. It is submitted that the Petitioners have shown by a preponderance of the evidence that Decedent was impelled to make the gift by motives associated with life, and that the Court below was clearly erroneous in reaching a different result on largely uncontroverted facts.

CONCLUSION

It is respectfully submitted that the decision of the Tax Court should be reversed and judgment entered in favor of the appellants.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York,
City of New York, ss.:
County of New York,

ALFRED BUSH JR., being duly sworn, deposes and says that he is over 18 years of age. That on the 13th day of March, 1975, he served 3 copies of BRIEF ON BEHALF OF APPELLANTS and 3 copies of REPLY BRIEF ON BEHALF OF APPELLANTS upon:

GILBERT E. ANDREWS
Chief, Appellate Division
Department of Justice
Washington, D.C. 20530

By depositing 3 copies of the above-same securely enclosed in a post-paid wrapper, in a branch depository maintained and exclusively controlled by the United Post Office at Greenwich and Vestry Streets addressed to the above-named, that being the address within the state designated by them for that purpose upon the preceding papers as the place where they regularly kept office, and at which place they regularly received mail.

Sworn to before me this
13th day of March, 1975

Abraham L. Meilen

ABRAHAM L. MEILEN
NOTARY PUBLIC, State of New York
No. 31-9821352
Qualified in New York County
Commission Expires March 30, 1976

Alfred Bush Jr.